

Claimant worked part-time for respondent, going into individual homes and providing in-home care. Claimant's job included doing cooking, cleaning, laundry, vacuuming and other household tasks. On January 5, 2006, while sitting at the table of an older woman, claimant was bitten on the middle finger on her right hand by a spider. Claimant developed

a white blister on the finger and it began to swell and worsen. Claimant testified that she had seen spiders in the older woman's house before, having killed several of them.

Claimant sought medical treatment at the Handsby Medical Clinic and at the Neosho Memorial Regional Medical Center emergency room. The medical reports from the Handsby Medical Clinic and from the emergency room beginning January 10, 2006, indicate claimant was bitten by a spider. Claimant's condition continued to worsen, and claimant was admitted to the hospital. She was treated with antibiotics and taken off work from January 16 to February 13, 2006.

In workers compensation litigation, it is the claimant's burden to prove his/her entitlement to benefits by a preponderance of the credible evidence.¹

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.²

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.³

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

... have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁴

Respondent argues that claimant has failed to prove that she suffered an accidental injury arising out of and in the course of her employment. Respondent first calls into

¹ K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

² *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

³ K.S.A. 2005 Supp. 44-501(a).

⁴ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

question claimant's credibility, arguing that claimant's story changed during the course of this litigation. In a taped telephone conversation with a St. Paul Travelers representative, claimant stated that she did not see the spider. During the preliminary hearing, claimant testified that she did see the spider. This Board Member is concerned by respondent's argument for two reasons. First, the transcript of the alleged conversation between claimant and a person unknown was not identified at the preliminary hearing, except by respondent's attorney. No further foundation was offered. Neither the original tape recording of the conversation nor corroborating testimony from the person responsible for the interview was offered at preliminary hearing. There would be no way to verify the accuracy of the transcript of the alleged conversation. Additionally, claimant was the only person to testify in this matter. Therefore her description of the accident is the only one in the record.

Respondent also argues that claimant must prove that her employment exposed her to an increased risk of a spider bite. In support of its position, respondent cites *Johnson*.⁵ First, respondent in its brief identifies *Johnson* as an unpublished opinion, but fails to attach a copy of the opinion, as is required by Supreme Court Rule 7.04.⁶ Respondent then argues that *Johnson* would restrict claimant's right to recover, as claimant failed to prove the injury resulted from something other than the normal activities of day-to-day living.⁷ However, respondent fails to show how being bitten by a spider is a normal activity of day-to-day living. This Board Member would consider it a rather unusual event, and anything but normal. This Board Member finds that claimant has proven that she suffered an accidental injury arising out of and in the course of her employment with respondent.

Respondent also objects to the award of medical treatment and temporary total disability compensation as a result of this injury.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?

⁵ *Johnson v. Johnson County*, 130 P.3d 148, 2006 WL 619191, Unpublished Disposition, Kan. App., March 10, 2006 (No. 93,466).

⁶ Regarding *Johnson*, it was previously filed as an unpublished opinion. The Supreme Court granted a motion to publish pursuant to Rule 7.04. The published version was filed with the Clerk of the Appellate Courts on November 14, 2006. That published version is cited *Johnson v. Johnson County*, ___ Kan. App. 2d ___, 147 P.3d 1091, *rev. denied* ___ Kan. ___ (2006).

⁷ K.S.A. 2005 Supp. 44-508(e).

3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?⁸

The ALJ has the jurisdiction to determine a claimant's entitlement to both temporary total disability and medical treatment at a preliminary hearing. The Board does not have the jurisdiction to question either from an appeal of that preliminary hearing. Respondent's appeal of these issues is, therefore, dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Thomas Klein dated November 6, 2006, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January, 2007.

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Blake Hudson, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

⁸ K.S.A. 44-534a(a)(2).

⁹ K.S.A. 44-534a.